U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 December 2006

In the Matter of

Case No.: 2005 BLA 06219

M.M.[1]
Claimant

v.

ALLIED COALS, INC.
Employer

and

SECURITY INSURANCE COMPANY
OF HARTFORD
Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party-In-Interest

Christie Hutson, Lay Representative
Lafollette, TN
For the Claimant

Denise Kirk Ash, Esq.
Lexington, KY
For the Employer/Carrier

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER DENYING BENFITS

[1]Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Black Lung Benefits Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

This is a second subsequent claim[2] for benefits arising under the Black Lung Benefits Act, 30 U.S.C. §901 *et seq.* (hereinafter "the Act"). The miner filed his first claim on May 26, 1993. It was denied by the Office of Workers' Compensation Programs ("OWCP") on November 17, 1993. The miner filed another claim on April 23, 2000. Since claimant filed this claim more than one year after the final denial of the previous claim, it is considered a subsequent claim under 20 C.F.R. §725.309 (2001).[3] On July 8, 2004 claimant filed the instant claim (DX 4),[4] which is the second subsequent claim. OWCP determined that claimant was not entitled to benefits on this claim, and claimant requested a hearing.

A formal hearing was held on March 29, 2006 in Knoxville, Tennessee. Claimant was the only witness to testify. The issues contested by the employer were pneumoconiosis, causal relationship, total disability, causation and change in conditions. At the hearing, the record was kept open for the employer to file rebuttal and rehabilitative evidence. When this evidence was filed, the record was closed. Both parties filed post-hearing briefs. Based on the evidence contained in the record of this proceeding, I find that the claimant is not entitled to benefits.

FINDINGS OF FACT AND CONCLUSION OF LAW

Background

Claimant is 57 years old, married and his wife is his only dependent under the Act (*see* DX 4). He is a high school graduate and has no formal vocational training (DX 4 at 5). Claimant worked as an underground coal miner for 12 years (TR 5). His primary job in the mines was operating a drill at the face of the coal, although he performed other jobs as well. While working as a miner, he sometimes wore a respirator (TR 16).

Claimant last worked as a coal miner in May, 1990, for Allied Coal (DX 7). Allied is a subsidiary of West Coal Corp., as were almost all of the companies for whom the claimant worked as a miner (DX 2). Claimant stopped working because he injured his back and had surgery (TR 29). After the surgery, the doctor told him to quit working (*id.*). Claimant has not worked anywhere since he quit mining (TR 27). He still takes medication for back pain, as well as for high blood pressure and water retention (TR 31). He currently weights 285 pounds

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[2]Under 20 C.F.R. §725.309 prior to the 2001 amendments to the black lung regulations, "subsequent" claims were referred to as "duplicate" claims. For the sake of uniformity, claims which were called duplicate claims at the time they were filed will be referred to as subsequent claims in this decision.

[3] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

[4]Citations to the record of this proceeding are abbreviated as follows: CX – Claimant's Exhibit; DX – Director's Exhibit; TR – Hearing Transcript. Director's Exhibit 1 is the file from the miner's initial claim, and Director's Exhibit 2 is the file from the miner's first subsequent claim.

(TR 31). He has been receiving Social Security disability benefits since about 1993 for his back problem and "nerves" (TR 33).

Claimant testified that he has a breathing problem. His primary care physician, Dr. Goff, prescribed oxygen for him about four years ago, and he uses it about 12 hours a day (TR 19-20). He also uses inhalers and a nebulizer about three times a day (TR 20-21). Finally, claimant testified that he smoked about a half pack of cigarettes a day for 20 years (TR 25). But at his October 12, 2004 deposition, he testified that he smoked about ¾ of a pack of cigarettes a day from age 17 or 18 until 1993 (DX 10, at 38-39), which is a little more than 25 years. He told Dr. Seargeant on June 8, 1993, that he smoked ¾ pack of a pack of cigarettes daily from his teens, and was still smoking (DX 1); he told Dr. Seargeant in September, 2000 that he stopped smoking in 1998 (DX 2); and he told Dr. Kelly in November 2004 that he smoked a half pack of cigarettes a day from the age of 18 through age 47 (DX 12). I find that claimant smoked ¾ of a pack of cigarettes a day for 25-30 years.

On May 24, 2000, claimant's primary care physician, Dr. Goff, wrote a letter stating that the claimant:

> has the most severe type of epidermolysis bullosa. He has sores over more than 50% of his body all the time…. The same process is active in his mouth & GI tract. He has severe scarring of his esophagus. He has outlived the statistics for this disease. He is living on liquids.

DX 2.

Change in Conditions

Since the claim was filed after January 19, 2001, the regulations contained in Part 718 as amended in 2001 are applicable. In order to be eligible for benefits under those regulations, the claimant must prove that he has pneumoconiosis arising out of his coal mine employment and is totally disabled by that disease. It is the claimant's burden to prove each of the elements establishing his entitlement to benefits. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 18 BLR 2A-1 (1994). But since this is a subsequent claim for black lung benefits, §725.309(d)(2) requires the claimant to make an initial showing that one of the applicable conditions of entitlement upon which the prior denial was based has changed as a prerequisite to the further consideration of the claim. The U.S. Court of Appeals for the Sixth Circuit, under whose jurisdiction this claim falls since all of claimant's coal mine employment occurred in Tennessee, requires that:

> to assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record

> evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Sharondale Corp. v. Ross, 42 F.3d 993, 997-98 (6th Cir. 1994). Both of the miner's previous claims were denied because he failed to prove either that he had pneumoconiosis or a totally disabling respiratory or pulmonary impairment. He must establish one of these elements of entitlement based on new evidence in order for his claim to be fully considered.

I find that the claimant has established a change in conditions, by proving that he is now totally disabled. The evidence filed in connection with this latest claim is consistent in that both of the pulmonary function studies (DX 12, 13) are virtually normal and all three of the arterial blood gas tests (DX 12, 13; CX 4) produced values qualifying for presumed total disability under Appendix C to Part 718. Dr. Dahhan, a board-certified pulmonary specialist who examined the claimant on behalf of the employer on September 30, 2004, states that '[f]rom a respiratory standpoint, [claimant] does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand." (DX 13, report of Dr. Dahhan at 2). Since the employer's own expert finds that claimant has a totally disabling respiratory impairment – a point completely ignored by employer's counsel in her post-hearing brief - I find that claimant is now totally disabled. Since one of the applicable conditions of entitlement upon which the prior denial was based was total disability, claimant has established a change in conditions, and all of the evidence in the record will be considered in determining whether the miner meets the criteria for an award of benefits.

Pneumoconiosis

Claimant can establish pneumoconiosis in several ways. *See generally* §718.202. Under §718.202(a), a claimant can establish pneumoconiosis with x-ray, biopsy or autopsy evidence or by a reasoned medical opinion. The record in the instant case is devoid of biopsy evidence and, of course, there is no autopsy evidence, so the x-ray evidence and medical reports must be examined.

The only x-ray interpretations in the record of the two previous claims were from Dr. E. Nicholas Sargent, an extraordinarily qualified radiologist and B-reader (a physician certified by the National Institute for Occupational Safety and Health of having demonstrated expertise in the interpretation of x-rays for pneumoconiosis), and Dr. Thomas Cohen, a board-certified radiologist. Both interpreted a June 8, 1993 x-ray in connection with the miner's initial claim (DX 1) and a September 12, 2000 x-ray in connection with the first subsequent claim (DX 2) as totally negative for pneumoconiosis. The record from the current claim contains six additional x-ray readings. Dr. Ahmed, a board-certified radiologist and B-reader, interpreted three x-rays, taken on September 30, 2004 (DX 2), November 11, 2004 (CX 3) and January 6, 2006 (CX 1), as positive for pneumoconiosis. Dr. Kelly, a board-certified pulmonologist who conducted the DOL black lung examination, interpreted the November 11, 2004 x-ray as completely negative for pneumoconiosis (DX 12); Dr. Dahhan, who in addition to being a pulmonary specialist is a B-reader, read the September 30, 2004 x-ray as completely negative for pneumoconiosis (DX 13; EX 1-2); and Dr. Broudy, who also is both a board-certified

pulmonary specialist and B-reader, interpreted the January 6, 2006 x-ray as completely negative for pneumoconiosis (EX 3-4).

Since pneumoconiosis may be both latent and progressive (*see* §718.201(c)), the most recent x-rays are entitled to the greatest weight. But the readings of the earlier x-rays – particularly those of the September 12, 2000 x-ray, which was taken 10 years after the miner's last exposure to coal dust - are nonetheless probative. As was previously pointed out, all of these readings are negative. In regard to the readings of x-rays taken since the previous denial of benefits, only a single physician, Dr. Ahmed, found pneumoconiosis. Although Dr. Ahmed is both a B-reader and board-certified radiologist, Drs. Dahhan and Broudy are also B-readers, and both are board-certified pulmonary specialists. Although some administrative law judges give more weight to the x-ray interpretations of B-readers who are also board-certified radiologists - so-called dual qualified physicians – as compared to B-readers who are not, I have yet to hear a rational explanation for giving less weight to the opinion of a B-reader who is also a pulmonary specialists as opposed to one who is also a radiologist. Both specialties receive similar training in interpreting chest x-rays. Further, since, as their specialty implies, pulmonary specialists only treat patients with pulmonary problems, it is likely that they have greater expertise in interpreting chest x-rays than do most radiologists. Further, Dr. Sargent is both a board-certified radiologist and B-reader. In any event, based on this record, there is no reason to give the readings of B-readers who are board-certified radiologists more weight than those of B-readers who are board-certified pulmonologists. Accordingly, I find that the three positive readings by Dr. Ahmed are outweighed by the negative readings of Drs. Dahhan, Broudy and Sargent, and the x-ray evidence is negative for pneumoconiosis.

Despite the existence of negative x-ray evidence and the absence of any applicable presumptions, claimant may establish pneumoconiosis under §718.202(a)(4) "if a physician exercising sound medical judgment … finds that [he] suffers … from pneumoconiosis." A physician can make such a finding "based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories." *Id.*

In regard to the previous claims, the DOL black lung examinations were conducted by Dr. L.J. Seargeant, whose qualifications are not in the record. The evidence before Dr. Seargeant was similar on both occasions: negative x-ray readings by Dr. Cohen; pulmonary function studies producing values well above those needed for presumptive total disability under Appendix B to Part 718; and blood gas test results meeting the standards for presumptive total disability under Appendix C to Part 718. On each occasion, Dr. Seargeant concluded that the claimant has no evidence of pneumoconiosis. Dr. Kelly conducted the DOL examination in connection with the current claim (DX 12). He read claimant's x-ray as completely negative; noted that the pulmonary function study was normal; and indicated that the blood gas study produced an elevated A-a gradient.[5] Based on this evidence, as well as his physical examination and medical, mining and smoking histories, Dr. Kelly diagnosed deconditioning, hypoxemia, congestive heart failure and mild coal workers' pneumoconiosis. He concluded

[5] Although Dr. Kelly did not discuss whether the blood gas test results qualify for presumptive total disability under Appendix C, in fact they do.

that claimant had no impairment "unless [patient] has cardiac restrictions …." (DX 12, at p.4 of the black lung examination form).

Dr. Kelly's opinion is not entitled to any weight, for it is unexplained and inconsistent. Since he finds no impairment due to lung disease; his x-ray interpretation was completely negative; and he attributes any impairment claimant may have to his cardiac disease; there is no apparent basis for his diagnosis of pneumoconiosis, be it "clinical" or "legal." *See* §718.201(a).

The only other recent report of a pulmonary examination is that of Dr. Dahhan's September 30, 2004 examination (DX 13). Dr. Dahhan took the usual histories; took a chest x-ray which he interpreted as completely negative; conducted a pulmonary function study which produced normal results; and conducted a blood gas study both before and after exercise which showed severe hypoxemia and which qualified for presumptive total disability under Appendix C to Part 718. Based on the results of his examination, Dr. Dahhan concluded that the claimant is totally disabled from a respiratory standpoint. But he attributed this disability to congestive heart failure, obesity and sleep apnea (*id*. at 2).[6] Due to the negative x-ray, normal physical examination and normal pulmonary function study, Dr. Dahhan concluded that the claimant does not have pneumoconiosis.

Dr. Dahhan's opinion is consistent with the results of his examination, and it is entitled to great weight.

The record also contains one-page "Medical Encounter" forms from the Mountain People's Health Council dated December 15, 2004, January 10, 2005, March 10, 2005, May 17, 2005 and November 17, 2005 (CX 5). These are pre-printed forms listing innumerable symptoms and parts of the body which are either circled or checked as appropriate. They also contain hand-written notations. None of these forms contain a diagnosis of pneumoconiosis. Finally, the record contains the report of an October 25, 2004 cardiac consultation by Dr. Pierson (CX 5). Claimant was referred for this consultation by Dr. Goff, his primary care physician, due to leg edema. In this report, Dr. Pierson notes histories of asthma and "coal miner's lung" (CX 5, Dr. Pierson's report at 1). He also lists under "New Problems" asthma and coal workers' pneumoconiosis (*id.* at 3), and states that he "suspects" claimant's dyspnea is due to his "known lung disease" because the diagnosis of congestive heart failure is "highly unlikely" (*id*.).

I find that Dr. Pierson's report cannot support a finding that the miner has pneumoconiosis. For there is no apparent basis for this diagnosis. That claimant reported a

[6]In his report, Dr. Dahhan writes that the claimant weighs 185 pounds (DX 13, at p.1). This clearly is a transcription error (or, as we used to call it, a "typo"). The claimant weighed 283 pounds when he was examined by Dr. Kelly only 1 ½ months after he was examined by Dr. Dahhan. Elsewhere in the attachments to Dr. Dahhan's report, the claimant's weight is listed several times as 130 kg. I take judicial notice that one kilogram equals 2.2 pounds. Accordingly, a person weighting 130 kg weights 286 pounds.

history of pneumoconiosis is not a basis for Dr. Pierson to diagnose this disease. Dr. Pierson notes that a chest x-ray was taken, but he reports no findings consistent with pneumoconiosis. He does not report the results of any tests measuring lung function, nor does he indicate awareness of the extent of claimant's smoking history or the relatively short time he worked as a miner. His only independent basis for his diagnosis of pneumoconiosis is claimant's report of dyspnea on exertion, a symptom common to most lung diseases and many other condition as well, including heart disease and obesity. Dr. Pierson diagnoses morbid obesity; and although he does not believe claimant has congestive heart failure, he notes that his electrocardiogram was abnormal. In short, Dr. Pierson's diagnosis of pneumoconiosis is unexplained and without foundation.

The only probative medical opinion since the denials of the previous claims is that of Dr. Dahhan, who diagnosed the absence of pneumoconiosis. In regard to the evidence from the previous claims, Dr. Seargeant found no evidence of pneumoconiosis. Based on a thorough review of the record, I find that the claimant has again failed to prove he has pneumoconiosis, and therefore this second subsequent claim for black lung benefits must be denied.

ORDER

The miner's second subsequent claim for black lung benefits is denied.

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JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, and P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law

judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).